

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 MARVIN DAVIS,)
5)
6 Petitioner,)
7) LUBA No. 96-118
8 vs.)
9) FINAL OPINION
10 LANE COUNTY,) AND ORDER
11)
12 Respondent.)

13
14
15 Appeal from Lane County.

16
17 Bill Kloos, Eugene, filed the petition for review and
18 argued on behalf of petitioner. With him on the brief was
19 Johnson Kloos & Sherton.

20
21 Stephen L. Vorhes, Assistant County Counsel, Eugene,
22 filed the response brief and argued on behalf of respondent.

23
24 GUSTAFSON, Referee; HANNA, Chief Referee, participated
25 in the decision.

26
27 DISMISSED 01/02/97

28
29 You are entitled to judicial review of this Order.
30 Judicial review is governed by the provisions of ORS
31 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a preliminary legal lot
4 determination issued by the county.

5 **FACTS**

6 Petitioner owns a 5.0-acre parcel, which was created in
7 1994 from a 9.9-acre parcel without benefit of the county's
8 required partitioning process.¹ The remaining 4.9-acre
9 parcel was sold through nonjudicial foreclosure in April,
10 1996. The parties appear to agree that the foreclosure
11 proceeding legalized the the 4.9-acre lot. That 4.9-acre
12 lot is not subject to this appeal. Title to the 5.0-acre
13 parcel was not affected by the foreclosure proceeding.
14 Nonetheless, petitioner's attorney wrote to the county
15 counsel, requesting a recordable determination from the
16 county that the 5.0-acre parcel was a legal lot, asserting
17 that the foreclosure of the 4.9-acre parcel legalized both
18 parcels resulting from the earlier partition of the 9.9-acre
19 parcel.²

¹Petitioner attempted to legalize the 5.0 acre parcel in 1995 through a partition application, which was denied by the county hearings officer.

²ORS 92.010(7)(a) and the definition of "partition land" in LCC 13.010 (the definition section to the county's land division chapter) both state:

"'Partition land' means to divide into two or three parcels of land within a calendar year, but does not include:

"(a) A division of land resulting from a lien foreclosure, foreclosure of a recorded contract for

1 The county counsel responded to the request, advising
2 petitioner's attorney that a request for a legal lot
3 determination must be submitted on a "land use application
4 form" to the county land management division. Record 21.³
5 Petitioner then submitted the required application form,
6 along with a \$177.50 filing fee for a "legal lot
7 verification."⁴ Based upon documentation in the county's
8 records, a county engineer issued a form determination, with
9 appropriate blanks completed or checked, that concludes that
10 the property "does not constitute a legal lot." Record 4-5.
11 The determination concludes:

12 "This is a preliminary indication that the above
13 referenced property, as further designated on the
14 enclosed map, is not a legal lot. The decision
15 that this property does not constitutes (sic) a
16 legal lot will be made at the time of the first
17 permit or application action where a legal lot is
18 required. If the boundaries of this parcel has
19 (sic) been changed than (sic) at the time of a

the sale of real property or the creation of
cemetery lots[.]"

The definition of "partition land" in LCC 16.090 (the definition section for the county's land use and development code) is identical.

³The county counsel's letter also cautions:

"The information you provided in your letter * * * seems to indicate the parcels were partitioned before the trust deed foreclosure. If so, it may be difficult to conclude the division of land resulted from a lien foreclosure as required in ORS 92.010(7)(a) and Lane County Code 13.010." Record 21.

⁴LCC 60.851 "establishes fees for County services as listed." The fee for "Legal Lot Verification" is listed at LCC 60.851(11). LCC 60.851 lists only fees; it includes no standards for evaluation of any services listed in that section.

1 permit or application which requires a legal lot,
2 a new Legal Lot Verification will be required."
3 Record 5.

4 Petitioner appealed the engineer's determination, on a
5 form designated for appeals of planning director decisions.
6 Petitioner's explanation in support of the appeal states:

7 "The 9.9 acres comprising Tax Lots 1500 [the 4.9
8 acre parcel] and 1501 [the 5.0 acre parcel] (Tax
9 Map 19-01-20-00) was partitioned by the
10 nonjudicial foreclosure of a Trust Deed * * *
11 which resulted in the creation of Tax Lot 1501 as
12 a legal lot upon recordation of the trustee's deed
13 * * * pursuant to ORS 92.010(7) and Lane Code
14 Section 13.010." Record 3.

15 The county planning director refused to accept the
16 appeal, stating in a letter to petitioner's attorney:

17 "Attached, please find a check for \$100.00 * * *
18 submitted as the application fee attached to an
19 appeal of a Lane County staff finding that Tax lot
20 1501 * * * is not a legal lot. I am returning
21 this check and refusing the appeal at this time
22 because the information supplied by [the engineer]
23 in his report * * * is a *preliminary* indication
24 that the above referenced property is not a legal
25 lot, not a *final land use determination*. A final
26 decision regarding the status of this property
27 will be made at such time as the first building
28 permit or land use application is made where a
29 legal lot is required.

30 "I understand that you have a sincere disagreement
31 regarding the County's initial position on this
32 matter. If you have any information which you
33 feel was overlooked or misinterpreted by the
34 County Staff initially I am willing to review this
35 information. If you are interested in proceeding
36 directly through the land use appeal process then
37 I must direct you to submit application materials
38 for a final land use decision, in order to begin
39 this process." (Emphasis in original.) Record 1.

1 Petitioner appeals the engineer's determination.

2 **MOTION TO DISMISS**

3 The county moves to dismiss this appeal because the
4 legal lot determination is (1) not a final land use decision
5 over which this board has jurisdiction under ORS
6 197.015(10)(a)(A) because it does not apply any land use
7 regulation; and (2), alternatively, not a land use decision
8 under ORS 197.015(10)(b) because it does not require
9 interpretation or the exercise of policy or legal judgment.

10 We consider first whether the appealed decision is a
11 land use decision.

12 ORS 197.015(10) prescribes this board's jurisdiction
13 over land use decisions, in relevant part, as follows:

14 "(10)"'Land use decision':

15 "(a) Includes

16 "(A) A final decision or determination
17 made by a local government or
18 special district that concerns the
19 adoption, amendment or application
20 of:

21 "* * * * *

22 "(iii) A land use regulation; or

23 "* * * * *"

24 ORS 197.015(11) defines "land use regulation" to mean:

25 "any local government zoning ordinance, land
26 division ordinance adopted under ORS 92.044 or
27 92.046 or similar general ordinance establishing
28 standards for implementing a comprehensive plan."

29 Petitioner argues the engineer's determination on the

1 legality of his lot is a final land use decision because it
2 concerns "the application of a land use regulation of the
3 county." Petition for Review 3. The "regulation"
4 petitioner argues the decision applies is the county's
5 zoning code definition of "Legal Lot" in LCC 16.090.⁵
6 Petitioner argues that "[i]n processing this application,
7 the County necessarily was evaluating the facts relevant to
8 the subject property against the definition of legal lot in
9 the zoning code. Hence, the decision was a land use
10 decision." Petitioner for Review 4.

11 The LCC 16.090 definition of "Legal Lot" contains no
12 standards for evaluation. Rather, it is a defining
13 reference for use when that term is applied to the
14 substantive regulations and standards of the county's land
15 use and development code. The definition does not, in and
16 of itself, establish any regulations by which a land use
17 application must be evaluated. That the engineer may have
18 referred to the county's definition of "legal lot" in
19 completing the legal lot verification form does not

⁵LCC Chapter 16 is the county's land use and development code. LCC 16.090 defines "Legal Lot" as:

"A lawfully created lot or parcel. A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are changed or vacated or the lot or parcel is further divided as provided by law."

Petitioner also identifies the definition of "Partition Land" in LCC 16.090 as an applicable regulation, but does not explain how the county applied that definition in evaluating petitioner's request for legal lot verification.

1 establish that the county applied any land use regulations
2 to petitioner's application.

3 However, although the county's definition of "legal
4 lot" includes no regulatory standards, the county does
5 provide a "service" of verifying the legality of lots.
6 Petitioner availed himself of that service, by requesting a
7 declaratory determination that his lot legally exists, and
8 paying the required fee. At oral argument, petitioner's
9 attorney argued that by virtue of its offering that service,
10 the county has a "de facto" process that is "blessed by
11 forms and application fees." Accordingly, petitioner argues
12 the code has a process that "anticipates these approvals."

13 Petitioner does not explain what "approval" this de
14 facto process provides. In fact, it appears that the
15 county's "legal lot verification" service is not intended to
16 and in fact approves nothing. Rather, the county's service
17 involves nothing more than reviewing the county records to
18 determine whether those records indicate that the lot was
19 legally created. If an applicant desires a binding
20 "approval" of a legal lot, the process for that approval
21 must be followed; an expressly nonbinding legal lot
22 verification does not provide that process.

23 Even if the county's service of preliminarily verifying
24 the legality of lots could be construed to apply
25 "regulations" under ORS 197.015(10), the county's
26 determination that petitioner's parcel does not satisfy the

1 definition of legal lot would only constitute a final land
2 use decision appealable to this Board if the county had a
3 process for making such binding determinations. As we
4 explained in Hollywood Neigh. Assoc. v. City of Portland, 21
5 Or LUBA 381 (1991),

6 "When a local government interprets existing
7 comprehensive plan or land use regulation
8 provisions without amending or adopting plan or
9 land use regulation provisions or granting or
10 denying a development permit or other land use
11 approval, such a decision is a final decision if
12 it is issued pursuant to an established local
13 process for issuing binding declaratory rulings.
14 General Growth v. City of Salem, 16 Or LUBA 447,
15 451-53 (1988); see also Medford Assembly of God v.
16 City of Medford, 297 Or 138, 140, 681 P2d 790
17 (1984)." Id. at 384. (Emphasis in original.)

18 In this case, although petitioner completed a "Land Use
19 Application" form, the county code provides no process for
20 making a binding declaratory determination outside the land
21 use approval and permitting process, and the county did not
22 purport to make a determination that is binding on
23 petitioner. Rather, as the county's determination states,
24 the verification provided to petitioner is a preliminary,
25 advisory opinion on whether the lot was legally created. A
26 binding, final determination will be made at such time as
27 petitioner files an application for an approval, which
28 requires a legal lot.⁶ At this point, the county has not

⁶Petitioner argues that the statement in the determination that it is "preliminary" is an unenforceable "condition" of the decision, which violates ORS 215.416(8) and ORS 215.428, and does not affect the finality

1 made a final land use decision over which we have
2 jurisdiction.⁷

3 Petitioner's motion to transfer to circuit court is
4 denied. Owens Development Group v. City of Gearhart, 111 Or
5 App 476, 826 P2d 1016 (1992).

6 Petitioner's appeal is dismissed.

of the decision. Although petitioner states, without explanation, that the challenged decision is a "permit" as that term is defined in ORS 215.402(4), petitioner's application does not request any development approval or permit. We find no basis upon which to conclude that petitioner's request for a "Legal Lot Determination" could be construed to be a permit under ORS 215.402(4). Hence, neither ORS 215.216(8) nor 215.428 prescribe the manner in which the county must process petitioner's request.

⁷Because we determine the county's legal lot determination is not a final land use decision under ORS 197.015(10)(a)(A), we need not address the county's alternative basis for its motion to dismiss, that the decision is not a land use decision because it is made "under land use standards which do not require interpretation or the exercise of policy or legal judgment." ORS 197.015(10)(b)(A). We nonetheless note that petitioner has not pointed to any legal standards in the definition of "legal lot" or "partition land" which the engineer was required to interpret or for which he had to exercise legal judgment in evaluating the facts of petitioner's property as they apply to the county's definitions.